DOCKET NO. AANCV186026839S

SUPERIOR COURT

HUSH IT UP, LLC
V.
PLANNING AND ZONING COMMISSION
OF THE CITY OF SHELTON

JUDICIAL DISTRICT OF ANSONIA/
MILFORD
AT MILFORD

5/8/2019

I. FACTS

The plaintiff, Hush It Up, LLC, appeals the decision of the defendant, the Planning and Zoning Commission of the city of Shelton (commission) denying the plaintiff's application for the development of a "speakeasy" theme café.

The plaintiff is the sublessor of commercial real property located in a Restricted Business District (RBD) zone at 303 Bridgeport Avenue in Shelton, Connecticut (property). In April of 2016, the plaintiff applied to the Liquor Control Division of the Connecticut Department of Consumer Protection for a café liquor permit for the property. In its application, the plaintiff indicated that the property would be used as a bar/café with entertainment. On April 13, 2016, Richard D. Schultz, Jr. (Schultz), the Planning and Zoning Administrator for Shelton, reviewed the plaintiff's application and, upon finding that the zoning ordinances and bylaws do not prohibit the types of entertainment listed in the plaintiff's application, approved the application for a liquor license. Liquor Control, thereafter, approved the plaintiff's application and issued a liquor permit on April 6, 2017, and granted permission for acoustics, DJs, bands, karaoke, plays/shows and comedians. The plaintiff then leased the property and spent in excess of $100,000 on rent, improvements, and other business-related expenses between April 1, 2017, and December 1, 2017.

On October 31, 2017, the applicant and owner of the proposed business, Randi-Lee England (applicant), submitted to Schultz an application (#2304) for a certificate of zoning

NOTICE SENT TO: JONATHAN KLEIN, ESQ. AND TEODOSIO & STANEK
MAY 8, 2019. SCOTT.COM, ASST CLERK

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compliance. This application included a statement of use that described the proposed use as a "1920s Speakeasy Bar Theme." On November 7, 2017, Schultz sent a letter to the applicant denying her application for certificate of zoning compliance, concluding that the statement of use indicated that the proposed use constitutes a "Speakeasy activity," which is a prohibited use under the regulations. On November 15, 2017, the applicant filed a revised application for a certificate of zoning compliance that included an addendum to the statement of use (#2318). In the addendum, the applicant explained that her proposed use of the property does not constitute a Prohibition-era speakeasy that illegally serves alcoholic beverages. Instead, she argued that the property's proposed use is a speakeasy theme café, operating under its café liquor permit issued by Liquor Control that will include local DJs, acoustics, comedians and other live musicians and plays/shows. In the addendum, the applicant also explained that the decor, atmosphere and theme of the property will be a 1920s speakeasy, meaning that it will take on the appearance of a Prohibition era speakeasy where hostesses will wear flapper costumes to invoke the style of that era. The addendum also provides that the applicant is aware that an "adult oriented business" is prohibited in an RBD zone. The applicant stated in the addendum that the property would not be used for any form of "adult oriented business" that the regulations prohibit, including an "adult entertainment business," an "accessory adult use," an "adult cabaret," or an "adult personal service establishment." Thereafter, Schultz placed the applicant's revised application on the commission's agenda.

The zoning commission heard the matter regarding the revised application on December 19, 2017. At the meeting, the plaintiff's counsel provided the following relevant information before the commission. The plaintiff applied for a liquor permit for an establishment in the style

of a speakeasy, which, by today's definition, is legal. The plaintiff's counsel reiterated the description of the proposed use for the property as described in the addendum to the statement of use and explained that it is not an "adult oriented business" in any form and that there is nothing in the regulations that prohibits a "speakeasy" theme café. The plaintiff's counsel also explained that he was in no position to address the parking and occupancy concerns raised in the fire marshal's report to the commission because he had not been provided with the report prior to the meeting.

Several of the commissioners expressed concerns regarding the proposed use and also discussed issues of parking and occupancy that were raised in the fire marshal's report. One commissioner read the December 6, 2017 letter from the fire marshal, where it was stated that the maximum occupancy for the property is approximately fifty customers. Based on this occupancy estimate, the fire marshal expressed concerns about possibly inadequate parking and concluded that he did not approve of the plaintiff's application for zoning compliance. The commission also provided copies of a petition signed by town residents demonstrating their opposition to the application. Neither the fire marshal's report nor the petition were provided to the plaintiff's counsel prior to the meeting and the plaintiff's counsel asked that the commission hold the matter open after the conclusion of the meeting to allow the plaintiff an opportunity to address the fire marshal's letter and the petition; this request was denied. The commission also expressed its concerns that the proposed use on the liquor permit constituted a "theatre," or possibly a "nightclub," which are prohibited uses under the regulations. The plaintiff stated that the statement of use and the addendum did not provide that the proposed use would be for a theater or a nightclub. Additionally, the plaintiff's counsel stated during the meeting that it was never

provided notice of any of these concerns that were raised by the commissioners for the first time at the meeting and that the only issue to be addressed at the meeting should have been the speakeasy theme of the café. At the end of the meeting, the commission voted to deny the plaintiff's revised application.

On September 14, 2018, the plaintiff filed a brief in support of its appeal. On October 30, 2018, the commission filed a brief in opposition to the appeal. The plaintiff filed a reply on November 8, 2018. Pursuant to the court's order, the parties filed supplemental briefs addressing questions raised by the court. The plaintiff filed its supplemental brief on April 25, 2019, and the commission filed its supplemental brief on April 26, 2019.

II. AGGRIEVEMENT

Pursuant to General Statutes § 8-8 (b) "any person aggrieved by any decision of a [zoning] board . . . may take an appeal to the superior court for the judicial district in which the municipality is located . . . ." General Statutes § 8-8 (a) (1) provides that "[i]n the case of a decision by a zoning commission . . . 'aggrieved person' includes any person owning land in this state that abuts or is within a radius of one hundred feet of any portion of the land involved in the decision of the board." "Those persons who come within § 8-8 (a) (1) are statutorily aggrieved and are not required to plead and to prove the elements of classical aggrievement." *Lucas* v. *Zoning Commission*, 130 Conn. App. 587, 591, 23 A.3d 1261 (2011).

The plaintiff, in its complaint, alleges that it is the sublessor of the property. By submitting the application that the defendant denied, the plaintiff is directly affected by the commission's denial of its application. Therefore, pursuant to § 8-8 (a) (1), the plaintiff is statutorily aggrieved.

III. CONTENTIONS OF THE PARTIES

The plaintiff, in its brief in support of its appeal from the Commission's denial of its application, argues that the commission acted illegally, arbitrarily, and in abuse of its discretion in that: (1) there is not substantial evidence in the record to support the determination that the use described in the plaintiff's application fails to comply with the town's regulations; (2) the commission's denial of the plaintiff's application was predetermined before the record was opened, rather than based on substantial evidence in the record; (3) the fire marshal's report fails to make reference to any regulation governing the number of parking spaces required for a café use in an RBD zone; (4) a speakeasy theme café is not a prohibited use under the regulations; (5) the resident's petition should not have been considered; (6) the plaintiff was denied her right to fundamental fairness and administrative due process when the commission failed to provide the plaintiff's counsel with the fire marshal's report or the resident's petition prior to the meeting; and (7) the commission is barred by the doctrine of municipal estoppel from denying the plaintiff's application.

The commission, in its brief in opposition to the plaintiff's appeal, counters that it acted within its discretion in denying the plaintiff's application for a speakeasy theme café because there is substantial evidence in the record supporting its conclusion that the intended use is not allowed in an RBD zone. Furthermore, the commission argues that the fire marshal's report is consistent with the zoning regulations regarding parking. The commission also asserts that the plaintiff has failed to prove that she was denied fundamental fairness during the meeting. Additionally, the commission argues that there is no basis for a municipal estoppel claim since the plaintiff's intended use substantially changed.

The plaintiff, in its reply, argues that the intended use for its proposed speakeasy theme café did not change. The plaintiff also contends that the regulations do not require that a plot plan drawn to scale be submitted along with the application. Furthermore, the plaintiff asserts that its proposed use does not fall within the definition of a "theater" as defined in the regulations and therefore, should not be subject to the parking requirements for a theater.

IV. DISCUSSION

General Statutes § 8-6 (a) (1) allows the commission "[t]o hear and decide appeals where it is alleged that there is an error in any order, requirement or decision made by the official charged with the enforcement of this chapter or any [town zoning] bylaw, ordinance or regulation adopted under the provisions of this chapter." "[A] zoning board of appeals hears and decides an appeal de novo. . . . It is the board's responsibility, pursuant to the statutorily required hearing, to find the facts and to apply the pertinent zoning regulations to those facts. . . . In doing so, the board is endowed with a liberal discretion. . . . Indeed, under appropriate circumstances, the board may act upon facts which are known to it even though they are not produced at the hearing. . . . Upon an appeal from the board, the court must focus on the decision of the board and the record before it." (Internal quotation marks omitted.) *Woodbury Donuts, LLC* v. *Zoning Board of Appeals*, 139 Conn. App. 748, 758, 57 A.3d 810 (2012).

"In challenging an administrative agency action, the plaintiff has the burden of proof. . . . The plaintiff must do more than simply show that another decision maker, such as the trial court, might have reached a different conclusion. Rather than asking the reviewing court to retry the case de novo . . . the plaintiff must establish that substantial evidence does not exist in the record as a whole to support the agency's decision." (Citations omitted.) *Samperi* v. *Inland Wetlands*

Agency, 226 Conn. 579, 587, 628 A.2d 1286 (1993). "The question is not whether the trial court would have reached the same conclusion, but whether the record before the [commission] supports the decision reached. . . . If a trial court finds that there is substantial evidence to support a zoning board's findings, it cannot substitute its judgment for that of the board. . . . If there is conflicting evidence in support of the zoning commission's stated rationale, the reviewing court . . . cannot substitute its judgment as to the weight of the evidence for that of the commission. . . . The agency's decision must be sustained if an examination of the record discloses evidence that supports any one of the reasons given." (Internal quotation marks omitted.) *Parillo Food Group, Inc.* v. *Board of Zoning Appeals*, 169 Conn. App. 598, 604, 151 A.3d 864 (2016).

After a hearing held on March 7, 2019, the court ordered the parties to submit supplemental briefs addressing specific questions raised by the court. At this hearing, the parties conceded that some of the arguments initially raised are not viable. First, the plaintiff, in recognizing that the issue of municipal estoppel is not viable, agreed that Shultz's opinion prior to the hearing was not binding on the commission and, in fact, the commission was entitled to exercise its discretion in rejecting Shultz's earlier approval of the plaintiff's proposed use of the property. Additionally, the commission agrees that there is nothing in the Shelton regulations dictating or controlling a theme and/or name for an establishment that validly obtained a liquor permit for a speakeasy theme café. Further, the commission concedes that the regulations do not provide a definition for a theater and that there is nothing in the regulations that would require a window in the front door or preventing the front door from being painted black. The court, in turn, addresses each of the remaining issues.

1. Whether the Commission Erred in Finding that a Speakeasy Was Not a Permitted Use

The plaintiff argues that the commission erred in finding that a speakeasy theme is not a permitted use because there is not substantial evidence in the record to support the commission's determination that the use fails to comply with the regulations. The commission counters that the plaintiff, in its addendum to its statement of use, broadened its intended use from its initial description to include speakeasy theme activity, including shows, which violates the regulations and may qualify the proposed use as being an "adult oriented business" or a theater, which is prohibited under the regulations. The commission contends that because the plaintiff intends to make changes in the physical structure by concealing the property, and plans to allow skits and burlesque variety shows involving magicians, jugglers and ventriloquists on the property, that the use violated the regulations.

The court finds that the commission erred in finding that a speakeasy theme café was not a permitted use because the commission has failed to rely on substantial evidence in the record and regulations to support its denial of the plaintiff's application for a certificate of zoning compliance. In the statement of use, the plaintiff describes the intended use as a "bar/café with entertainment." Thereafter, in its addendum to the statement of use, the plaintiff explains that it "intends to open a bar and café with entertainment which may include local DJs, acoustics, comedians and other live musicians and plays/shows. . . . The decor, atmosphere and theme of the establishment is that of a 1920s 'speakeasy'." The plaintiff further describes the term speakeasy by its modern definition to be "a bar whose entrance typically is inconspicuous. . . . The vintage decor and atmosphere inside includes an authentic player piano and hanging photographs depicting scenes from the Roaring '20s, including speakeasies of that time and

related scenes. . . . The entire mileu is a throwback to the 1920s, and the hostesses will wear costumes of that era which evoke the style of flappers." The plaintiff also states in the addendum that the property will not be an "adult oriented business" as defined in the zoning regulations.

The court does not find the commission's arguments describing the broadened use of the property to be persuasive. Rather, the plaintiff's addendum to the statement of use provides further details about its proposed theme of the speakeasy café, rather than a change in the intended use of the property. The commission has failed to identify any specific requirements contained in the regulations that directly and/or indirectly apply to the plaintiff's proposed use of the property. The commission, therefore, erred in finding that a speakeasy theme café was not a permitted use because there was not substantial evidence in the record to reach this conclusion. Accordingly, the commission's denial of the plaintiff's application for a certificate of zoning compliance was in error and is hereby reversed.

2. Whether the Commission Erred in Finding that the Proposed Use Exceeds the Occupancy Limit

The plaintiff argues that the regulations do not address the number of patrons that are permitted for the type of use described in the plaintiff's application and that the commission does not demonstrate that it relied on any regulatory basis for accepting the fire marshal's letter limiting occupancy to approximately fifty people. The defendant counters that the fire marshal's letter addresses the occupancy limit and that it is reasonable for the commission to reach the conclusion that the fire marshal calculated the occupancy limit based on the square footage of the property.

The court finds that the commission has failed to provide any regulatory basis for its

reliance on the fire marshal's letter regarding the occupancy limit of the property. The fire marshal's letter concluded that the property fails to meet the occupancy requirement; this conclusion, however, did not make any reference to the zoning regulations and did not explain the calculating process or formula used in reaching its determination. Accordingly, the court finds that the commission's reliance on the fire marshal's occupancy requirements was not supported by substantial evidence in the record and therefore, its ruling was in error and is hereby reversed.

3. Whether the Commission Erred in Finding that the Proposed Use Lacks Adequate Off-Street Parking

The plaintiff argues that there are no specific regulations that mandate the number of on and/or off-street parking spaces for the plaintiff's type of use and that the only regulations that mention off-street parking apply to restricted retail outlets and business and professional offices. Additionally, the plaintiff argues that although parking is discussed in Chapter IV, § 42.2 of the Shelton Zoning Regulations, this section only provides that there must be parking spaces subject to minimum standards. The plaintiff contends that the regulations fail to provide for any minimum standards for an RBD zone or for a café in any zone. The commission counters that the fire marshal relied on §§ 42.1 and 42.2 of the zoning regulations in concluding that the property would require seventeen off-street parking spaces, and therefore, the proposed use violates parking requirements pursuant to the regulations.

Section 42.1 of the regulations provides, in relevant part, that [i]t is the purpose and intent of this Section to assure that parking spaces . . . are provided off the street in such number and location and with suitable design and construction to accommodate the motor vehicles of all

persons normally using or visiting a . . . building . . . at any one time." Additionally, § 42.2 provides that [o]ff-street parking spaces shall be provided in accordance with the following minimum standards. Parking must be located on the same lot as the use it serves unless the Commission approves parking on another lot as authorized herein as part of a Site Plan or Special Exception approval. In no case shall required spaces be located more than 500 feet from the entrance to the use they serve." (Emphasis in original.)

The court is not persuaded by the commission's argument that the fire marshal's decision was guided by the regulations. The sections referred to by the commission do not provide for minimum standards for RBD zones or for the type of property described in the plaintiff's application. Furthermore, the commission, in their supplemental brief, has failed to provide any formula used by the fire marshal to determine that the property would require seventeen parking spaces. Accordingly, the court finds that the commission's reliance on the fire marshal's occupancy finding was not supported by the record and therefore, the issue of off-street parking is remanded to the commission with instructions that it conduct a further review of the record to locate any evidence of support for its conclusion as well as to calculate a formula for the off-street parking requirements.

4. Whether the Commission Erred in Finding that the Proposed Use Constitutes an Indoor Theater or Nightclub

The plaintiff argues that there is not substantial evidence in the record to support the commission's finding that the proposed use is more akin to an "indoor theater" or "nightclub" because the use of the term speakeasy concerns the proposed theme, and an indoor theater and nightclub are not terms that are defined in the regulations. The commission counters that the

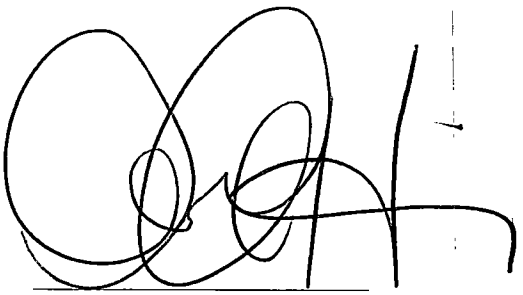
description of the proposed speakeasy café as explained in the addendum to the statement of use includes "shows" and "skits," which constitute a theater or a nightclub rather than a café and is therefore, prohibited pursuant to Chapter II, § 23.2 of the Shelton Zoning Regulations

Section 23.2 of the regulations provides, in relevant part: [l]and, buildings and other structures shall be used for one or more of the uses specified as permitted in SCHEDULE A, and no other. Any use not specified in SCHEDULE A as permitted is prohibited." The commission contends that since SCHEDULE A does not specifically permit a speakeasy use, it is prohibited.

The court finds that the commission erred in ruling that the proposed speakeasy theme use is a theater or nightclub because there is nothing in the record to support this finding. As discussed previously, the plaintiff in the present case stated in its statement of use that it intends to open a bar and café with entertainment. The addendum to the statement of use provides a more detailed description of the theme of the 1920s speakeasy theme. The court finds that § 23.2 of the regulations does not address whether the proposed use is for a theater or nightclub and there is no other basis that the commission relies upon in the record or in the regulations to support its finding that the proposed use is for a theater or a nightclub. Accordingly, the commission's finding that the proposed use is for a theater or a nightclub was in error and is, therefore, reversed.

V. CONCLUSION

For the foregoing reasons, the ruling by the Planning and Zoning Commission for the town of Shelton is reversed in part, and remanded to the commission to review the formula used in determining the requirements for off-street parking.



HILLER, J.T.R.